Elf Atochem North America, Inc. *and* United Steelworkers of America AFL–CIO–CLC and United Steelworkers of America, Local 88. Cases 4–CA–27569 and 4–CA–27657

July 17, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On September 25, 2000, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

We agree with the judge that the Respondent was obligated to bargain with the Union as a "perfectly clear" successor as of January 27, 1998, when it informed employees that it would provide employment to employees dedicated to the AtoHaas business, that their seniority would be recognized, and that they would receive equivalent salaries and comparable benefits. Moreover, we find, in any event, that the Respondent would have become a "perfectly clear" successor when it informed the Union in a March 17, 1998 letter that pending the negotiation of a new collective-bargaining agreement it intended to maintain the current terms and conditions of employment.[3] Accordingly, we agree with the judge that the Respondent violated Section 8(a)(5) by refusing to bargain with the Union and making unilateral changes in terms and conditions of employment.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Elf Atochem North America, Inc., Bristol, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(e).

"(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility findings unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). We shall also substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

[3] In "perfectly clear" successor cases, communications with the employees' union are regarded "as communications with the employees through their representative." *Marriott Management Services*, 318 NLRB 144 (1995).

Chairman Battista agrees that, as of the March 17, 1998 letter, the Respondent became a "perfectly clear" successor. He therefore finds it unnecessary to pass on whether the Respondent became a "perfectly clear" successor earlier, on January 27, 1998. In this regard, Chairman Battista notes that the Respondent, on January 27, said that it would provide "equivalent" salaries and "comparable" benefits. Although this may have been an assurance that salaries would be precisely the same, the difference in the quoted language suggests that the benefits might not be. Accordingly, Chairman Battista does not pass on whether the Respondent became a "perfectly clear" successor on January 27. The difference in dates is inconsequential inasmuch as the Respondent did not begin operations until June 1998, and did not hire the unit employees until November 1998.

[4] We therefore find it unnecessary to pass on the judge's stock transfer findings. Here, we are ordering the reinstatement of the terms and conditions in effect under the Rohm & Haas contract at the time of the Respondent's assumption of the AtoHaas Bristol operations until the Union voluntarily entered into a new collective-bargaining agreement with the Respondent setting forth the terms and conditions of employment. Accordingly, the remedy would not be materially different if we found that, in connection with a stock transfer, the Respondent was required to honor the collective-bargaining agreement of its predecessor.

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with United Steelworkers of America, AFL–CIO–CLC and United Steelworkers of America Local 88 as the exclusive bargaining representatives of employees in the following appropriate unit:

> All employees employed by Elf Atochem North America, Inc. at its Bristol, Pennsylvania facility engaged in general and departmental maintenance and certain installation work and all hourly paid production employees including production department quality control laboratory employees, common laborers, receiving and shipping employees; and excluding office clerical employees, salaried employees, all other laboratory employees, safety and plant protection department employees and all supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

WE WILL NOT unilaterally change terms and conditions of employment established by collective-bargaining agreements and practices in effect related to those agreements.

WE WILL NOT refuse to permit Donald Markert or other nonemployee union representatives to participate in disciplinary hearings.

WE WILL NOT in any like or related matter interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed under Section 7 of the Act.

WE WILL, on request, bargain with the Unions as the exclusive bargaining representative of the above-described unit.

WE WILL permit Donald Markert and other nonemployee union representatives to participate in disciplinary hearings as union representatives.

WE WILL, on the request of the Union on behalf of a particular employee, allow employees to return to their former positions who were denied that right during the period of November 2, 1998, to August 15, 1999, as a result of our elimination of the practice of permitting employees to return to their former positions within 5 days after assuming a new position.

WE WILL make whole employees in the above-described unit for any losses suffered during the period of November 2, 1998, to August 16, 1999, as a result of our unilateral changes in their terms and conditions of employment, with interest.

ELF ATOCHEM NORTH AMERICA, INC.

William Slack Jr., Esq., for the General Counsel.
Robert S. Hodavance, Esq. and *Jacqueline M. Kraeutler, Esq.*, of Philadelphia, Pennsylvania, for the Respondent.
Wayne A. Hamilton, Esq. and *Debra A. Jensen, Esq*., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on April 4 and 5, 2000. The charges were filed by the United Steelworkers of America, AFL–CIO–CLC (the International Union), and United Steelworkers of America, Local 88 (Local 88) jointly referred to as the Union against Elf Atochem North America, Inc. (the Respondent). The charges resulted in a consolidated complaint issuing against the Respondent on November 30, 1999.

The consolidated complaint alleges that the Respondent is a "perfectly clear" successor to the Rohm and Haas Company (R&H) and AtoHaas Americas, Inc. (AtoHaas) as to a unit of production and maintenance employees employed at a facility in Bristol, Pennsylvania. The complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally altering certain terms and conditions of employment for those employees by: on or about November 2, 1998,[1] (a) eliminating the payment of meal passes; (b) changing the starting times of unit mechanical department employees; (c) eliminating the payment of a training rate to unit employees who moved to a higher job classification; (d) reducing the period from 2 years to 1 year during which involuntarily demoted employees would be paid at their existing rate; (e) reducing the workers compensation supplement; (f) refusing to process grievances in accordance with the grievance procedure of the R&H collective-bargaining agreement; (g) eliminating the practice of not subcontracting work unless unit employees were unavailable to perform the work and of notifying the Union of subcontracting; (h) refusing to pay union representatives for time spent in negotiations up to a maximum of 1 week; (i) eliminating the practice of permitting employees to return to their former positions within 5 days after assuming a new position; (j) eliminating payment at two times an employee's hourly rate for hours worked over 12 per day; (k) eliminating payment at two and one-half times an employee's hourly rate for the first 8 hours worked on a holiday; (l) reducing call-in pay; (m) eliminating payment at one and one-half times an employee's hourly rate for hours worked on the employee's dayoff or on a sixth day in a week; (n) eliminating the practice of counting overtime hours in determining eligibility for premium pay other than premium pay for working overtime; (o) eliminating the payment of shift differentials when an employee was not scheduled to work the shift to which the differential applied; (p) eliminating the practice of permitting employees to take less than 8 hours off with less than 24 hours notice when they obtained the approval of a supervisor; (q) on or about January 24, 1999, reducing the amount of sick and accident benefits paid to employees; and (r) in early May 1999 refusing to permit Local 88 President Don-

[1] All dates are in 1998 unless otherwise indicated.

ald Markert to attend a meeting concerning discipline to be imposed on a unit employee.[2]

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND THE BARGAINING UNIT

The Respondent, a corporation, has been engaged in the manufacture, marketing, and sale of intermediate industrial, specialty and flurochemicals at its facility in Bristol, Pennsylvania, where it annually purchases and receives goods valued in excess of $50,000, directly from points outside the State of Pennsylvania. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the International Union and Local 88 are labor organizations within the meaning of Section 2(5) of the Act.

I find that the Union is the exclusive bargaining representative of the Respondent's employees in the following unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees employed by the Respondent at its Bristol, Pennsylvania facility engaged in general and departmental maintenance and certain installation work and all hourly paid production employees including production department quality control laboratory employees, common laborers, receiving and shipping employees; and excluding office clerical employees, salaried employees, all other laboratory employees, safety and plant protection department employees and all supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Events Leading to the Respondent's Assumption of the AtoHaas Bristol Operations

AtoHaas, a joint venture, was incorporated in 1992. R&H owned 51 percent of AtoHaas' stock and Elf Atochem, S. A. (Elf S.A.), a French chemical manufacturer, owned 49 percent of the stock. Elf S.A. is the parent company of the Respondent. AtoHaas manufactured acrylic plastic at plants in the United States, Mexico, and Europe. R&H has owned and operated a plant in Bristol, Pennsylvania (the Bristol plant), for over 50 years. For a number of years prior to 1997, the R&H production and maintenance employees at the Bristol plant were represented by Aluminum, Brick and Glass Workers International Union, Local Union No. 88. In 1997, the Aluminum, Brick and Glass Workers International Union merged with the United Steelworkers of America. Since 1997, employees at the Bristol plant have been represented by the Union. In May 1998, the Union and R&H entered collective-bargaining agreements with effective dates of May 1, 1998, through May 5, 2000. The collective-bargaining agreements cover a unit of production and maintenance employees referred to here as the R&H unit. While there is only one bargaining unit, there are two collective-bargaining agreements separately covering the maintenance and production employees.

Beginning in 1992, AtoHaas leased a portion of the Bristol plant from R&H for use in the manufacture of acrylic plastic. AtoHaas also entered an agreement with R&H where R&H provided AtoHaas labor for the leased portion of the plant. The employees provided by R&H remained on its payroll, were supervised by R&H and were included in the bargaining unit covered by the May 1998 collective-bargaining agreements. During the period from January through October 1998, R&H employed approximately 600 production and maintenance employees at the Bristol plant within the bargaining unit. Approximately 100 of these employees were employed in the portion of the plant leased to AtoHaas.

On January 27, R&H and Elf S.A. issued a joint press release announcing that the joint venture partners had signed a letter of intent whereby Elf S.A. would buy R&H's "50% interest in (the) AtoHaas joint-venture." At that time, R&H vice president in charge of performance, Albert Caesar, was also the president of AtoHaas. Basil Vassiliou was employed by R&H as vice president. On January 27, a memo issued under Caesar and Vassiliou's signature to the attention of AtoHaas' employees and R&H's employees working with AtoHaas. The memo announced the planned sale of R&H's share in AtoHaas to joint venture partner Elf Atochem and contained answers to projected questions by employees. The memo stated in its question and answer portion, in pertinent part, that "Elf Atochem will provide employment to all of the existing workforce dedicated to the AtoHaas business," and that "Elf Atochem will recognize employees' past years of service with AtoHaas and Rohm and Haas, and will provide employees with equivalent salaries and comparable health, welfare and benefits package, including pension, savings plan and vacation."[4] A memo by AtoHaas' area manager, Douglas Sharp, and R&H's Bristol site manager, Diane Fratini, containing the same question and answer statements regarding the Respondent's plans to offer the R&H unit employees employment and benefits was posted on the R&H Bristol site e-mail news board on January 27. The Sharp and Fratini memo also stated, "AtoHaas employees at the Bristol Site, including the production units . . . have many issues—both personal and professional—to work through." "Finally, customer expectations do not slack off due to internal changes. It's important that everyone at our site keep customer service at a premier level, meeting the high expectations of our customers."[5] Similarly, on January 27, Larry Wilson, R&H's

[2] The General Counsel withdrew, during the course of the hearing, a complaint allegation that the Respondent unlawfully eliminated the deduction of union dues from employee paychecks.

[3] The General Counsel's unopposed motion to correct the transcript is granted and received in evidence as GC Exh. 52.

[4] The memo also stated that "[t]he intellectual property related to PMMA and all trademarks will be included in the sale. (Plexiglas, Oroglas, Tuffak)."

[5] While the Sharp and Fratini memo mentioned "AtoHaas' employees at the Bristol Site," at that time, Sharp was the only person working in the Bristol plant who was on the AtoHaas' payroll. The other persons working at the plant were being paid by R&H.

chief executive officer, issued an e-mail to all R&H employees announcing the sale and stating that, "Elf Atochem has offered a job to every AtoHaas employee and Rohm and Haas employee associated with AtoHaas. They have promised equivalent salary and wages and comparable benefits to what is received today." On January 28, a memo under the signature of Bernard Azoulay, president and CEO of the Respondent was distributed to R&H employees who performed services for AtoHaas. The memo states, in pertinent part, "We want to assure you that we value all of the employees dedicated to the AtoHaas business and expect that all of you will join with us to fulfill our goals of becoming one of the most successful polymer companies in the world."

Douglas Sharp began working for the Respondent on June 4, as the plant manager for the AtoHaas Bristol plant. Prior to that time and since May 1996, Sharp had been employed by AtoHaas as the area manager for the Bristol plant. Sharp testified that around January 27, he attended a meeting with Respondent officials Bob Pelliciari, vice president of human resources, Jean-Claude Rebeille, executive vice president for manufacturing and the "the management team at the Bristol site," which, along with Sharp, included Wendra Griffith, Frank Maribito, and Ken Earle. Sharp testified that, at the meeting, the Bristol site managers were informed of the Respondent's intent to purchase AtoHaas and that when the deal was closed they would be employed by the Respondent. Sharp also testified that beginning around February there were numerous discussions with himself, Pelliciari, Rebeille, and Ed Wilcox, the Respondent's director of industrial relations, where it was stated that it was in the Respondent's interest to provide employment to the hourly employees at the jobsite.[6] Sharp testified that he conveyed to unit employees that it was his desire to have them work for the Respondent and that most of these conversations took place in June, July, and August. However, Michael Horton, a former R&H unit employee and a Local 88 wage committeeman, credibly testified that in early February, Sharp told Horton that following the sale Sharp expected to stay as plant manager and that the Respondent "was going to offer employment to all of the people that were in the unit."[7] Griffith, who had worked for R&H at AtoHaas in the area of labor relations, was hired by the Respondent on June 4, as human resource manager. Griffith testified that, as of January, it was her understanding that the Respondent was prepared to offer employment to all bargaining unit employees working in the AtoHaas division.

Donald Markert is the president of Local 88. Markert's credited testimony revealed that on January 26, he, along with Local 88's wage committee, was invited to a meeting attended by Sharp, Fratini, Vassiliou, and Caesar. Local 88 was told about the sale. Caesar stated, at the meeting, that the Respondent intended to employ all of the employees in the AtoHaas' unit.

On February 18, Pelliciari issued a memo addressed to AtoHaas' employees and R&H's employees working with AtoHaas. The memo stated, in pertinent part:

> The questions you are asking make it clear that you are eager to learn about Elf Atochem's compensation and benefits programs. I want to assure you that we are working hard to design the appropriate programs for a successful business transition and to answer your questions.
>
> . . . .
>
> Let me, however, restate what we said at the time of the original announcement. Elf Atochem will provide employment to the existing workforce dedicated to the AtoHaas business, with substantially equivalent compensation and coverage under the comprehensive benefit plans maintained by Elf Atochem generally for its employees.[8]

On March 17, Wilcox sent Markert a letter citing the pending sale and stating:

> This is to confirm that Elf Atochem intends to recognize United Steelworkers of America as the exclusive bargaining representative for AtoHaas hourly bargaining unit employees (and hourly bargaining unit employees of Rohm and Haas who are assigned to AtoHaas) who accept Elf Atochem's offer of employment. Accordingly, an Elf Atochem representative will be contacting you to schedule a meeting to commence negotiations for a collective-bargaining agreement between Elf Atochem and United Steelworkers of America. Pending the negotiation of a new collective-bargaining agreement, Elf Atochem intends to maintain the current terms and conditions of employment.[9]

By letter dated March 18, Mark Kircher, the human resources director for R&H at the Bristol plant, responded to a union information request relating to the sale. The Union was told that there was a signed nonbinding letter of intent outlining the intentions of the parties pertaining to the transaction. The Union was told that certain key portions of the letter of intent were as follows:

> b) Atochem will employ North American AtoHaas employees and Rohm and Haas employees dedicated to AtoHaas.
>
> c) Atochem's compensation to Transferring Employees will be substantially equivalent (including salary and bonus) to the employees' current compensation levels.
>
> d) As of the closing date, Transferring Employees will be covered by health, welfare and benefit designs maintained by Atochem.
>
> e) Transferring Employees will receive AtoHaas/Rohm and Haas past service credit in Atochem's health, welfare and benefits plans, including pension plans.

[6] The Respondent has admitted in its answer to the consolidated complaint that at all material times Wilcox, Sharp, Griffith, Maribito, and Earle were its statutory supervisors and agents. The Respondent has also asserted at pp. 4 and 16 of its posthearing brief that Pelliciari was authorized to convey information to employees on its behalf.

[7] Horton was employed by the Respondent at the time of his testimony.

[8] Griffith, whose duties included the distribution of the Pelliciari memo, testified that it was distributed to salaried employees but that "I do not recall whether this was distributed to the bargaining unit employees."

[9] The March 17, letter was copied to International Union Representative Roy Albert.

By letter dated April 8, the Union received documents from R&H in response to a request for information pertaining to the sale.[10] There was a document described in the cover letter as a nonbinding letter of intent called, "Heads of Agreement." The document states that it is an outline of the general principles of the sale. Pertinent parts of the document provide that Elf S.A. "will extend offers of employment to the R and H employees who are presently dedicated to support the AtoHaas operations in North America . . . at substantially equivalent compensation (including salary and bonus) as such employees presently enjoy." The document states that, "[i]n order to incent Transferring Employees to accept offers of employment with" Elf S.A., "(1) R and H agrees that it will not continue to employ and will deny severance benefits to any Dedicated R and H Employee who refuses a comparable offer of employment from Ato or any AtoHaas Legal Entity and will not reemploy any such person or extend an offer of employment to any AtoHaas Employee for a period of one year following the Closing Date unless otherwise agreed by" Elf S.A.

On June 4, R&H sold its stock in AtoHaas to the Respondent, a wholly owned subsidiary of Elf S.A. Griffith testified that the 40 to 45 salaried employees of R&H dedicated to AtoHaas including managers and supervisors became Respondent's employees at the time of the sale. On June 4, R&H entered into a service agreement with AtoHaas under which R&H agreed to continue to provide production and maintenance employees for the portion of the Bristol plant leased to AtoHaas. The parties to this proceeding have stipulated that this agreement remained effective through November 1, and that the approximately 100 bargaining unit employees employed in the portion of the Bristol plant leased to AtoHaas remained on R&H's payroll, were subject to R&H supervision, and were represented by the Union.

On June 5, a memo by Dan Hoyt, the R&H Bristol site manager, issued to the R&H bargaining unit employees concerning the "Elf Atochem Transition." The memo cited the June 4 sale and the service agreement in which R&H would provide the hourly workforce of operators and mechanics. The memo stated, in pertinent part that:

> Under this agreement, Elf Atochem supervision will assign work to the hourly workforce and provide the training and direction to the workforce as necessary.
>
> As these people still remain Rohm and Haas employees, Rohm and Haas supervision will be responsible for administering all contractual issues. Examples of these are: Disciplinary Process(,) Grievance Process(,) Payroll(,) Vacationing Scheduling(,) (and) Personnel related issues.

On June 10, 1998, AtoHaas' name changed to Atoglas and it became a division of the Respondent. On that date, the Union and the Respondent met for a bargaining session. It was attended by Wilcox, Sharp, Griffith, Earle, the maintenance manager, and Maribito, the production manager for the Respondent and by International Representative Albert, Markert, and Local 88's wage committee for the Union. Griffith's notes of the meeting reflect that Sharp made some introductory remarks. The notes read under Sharp's initials, "Benefits & Wages (keep people whole) . . . ." Union wage committeeman, Horton, credibly testified that during the meeting, Wilcox stated that he intended to offer employment to the bargaining unit employees because they wanted a smooth transition.[11] Markert's credited testimony revealed that, during the meeting, Wilcox stated that negotiations would not continue with the Respondent until the Union completed effects bargaining with R&H. Markert testified that when Albert asked what would happen in the future, Wilcox stated that, "We would live under the current Rohm and Haas terms of the current Rohm and Haas contracts, both mechanical and production, . . . , (u)ntil we concluded a contract."[12] Markert testified that Sharp stated during the meeting

[10] The Respondent, by a letter from R&H to its attorney, had previously been informed of R&H's intent to supply the Union with these documents.

[11] Wilcox testified that he told the Union during, the June 10 session, that "we were eager to retain the existing workforce."

[12] I have taken into consideration the witnesses' demeanor and have credited Markert's testimony as to what transpired at the June 10 meeting as set forth above. Markert's collective-bargaining minutes for the session were introduced into evidence. It is set forth at p. 4 of the notes that Wilcox stated, "We do clearly have in mind the way we want to operate in the future. We will honor the existing contract until we can negotiate a new contract agreement." Markert's notes and testimony reveal that Wilcox repeated this statement towards the end of the session. The following is set forth at pp. 8 and 9 of Markert's notes as to statements made by Wilcox at the meeting: "Our focus is on retaining the current workforce (currently in place at AtoHaas). Commit to the new base wages as negotiated with R&H. We want to prevent any wholesale training and movement. The benefits' package as presented in April, [a]s to the contract, itself. We are not RH. We want to establish our own identity. We are not prepared to live with the language of the contract or the current amendments to the contract. We will honor the current language in the interim, until we successfully negotiate a new contract. We would like to defer any further contract negotiations until you, (the Union), satisfies its issues with RH as to effects bargaining." According to the notes, Albert then asked Wilcox how long the interim period honoring the contract would be and Wilcox replied, "Until we negotiate the terms of a new contract with new working conditions. A week, a month, Elf has it[s] own culture. We want to be able to express our own culture." Markert's testimony that Wilcox stated that the Respondent would live by the R&H agreements until the parties negotiated a new contract was also corroborated by the credible testimony of General Counsel witnesses Horton and Ted Pofliet, current employees of the Respondent at the time of their testimony, who attended the meeting on behalf of the Union.

The Respondent called Griffith as a witness pertaining to the June 10 meeting. She testified that Wilcox stated that he would honor the R&H agreement, "until we have a workforce, or something like that. Until we know our workforce." Griffith could not recall the Union's response. She referenced p. 5 of her notes of the meeting, which does contain language supporting her testimony. However, I do not find Griffith's testimony on this point to be persuasive. First, Wilcox, Sharp, and Earle, testified during the course of the hearing but were not called on by the Respondent to corroborate this aspect of Griffith's testimony. Moreover, it is also reflected at p. 5 of Griffith's notes that Wilcox stated at the meeting that, "That contract with R&H, we're prepared to honor on an interim basis, until we renegotiate a new contract." P. 13 of Griffith's notes also serves to confirm Markert's testimony in that it shows that she wrote down towards the end of the meeting that Wilcox said, "Whatever your working conditions, we will live with that contract until we negotiate." In considering the witnesses

that the Respondent intended to employ around 77 production employees and 22 mechanical employees.

On July 6, the Union and R&H signed off on an effects bargaining agreement concerning the sale. The agreement offered three options for the R&H employees working in the AtoHaas area. Options one and two provided for a signing bonus and were conditioned on the employees accepting employment with the Respondent and resigning from R&H. Option three provided for no bonus and that the employee would remain an R&H employee. Options one and two were limited to a maximum of 77 production and 22 mechanical employees. The agreement provided that by July 10 eligible employees, "desiring employment with Elf Atochem would sign, nonbinding individual letters of intent . . . indicating their choice between #1 or #2 or #3." The employees were also given until July 31 for those desiring employment with the Respondent to sign an "Irrevocable Option Election Form." The effects agreement also provided that the signing bonus was contingent on, "there being an agreement on a new contract between the Union and Elf Atochem." The agreement stated that, "If no agreement can be reached between the Union and Elf Atochem, the parties will address the situation in accordance with the applicable provisions of the existing Rohm and Ha[a]s-Union contract. In this event, the Union reserves all rights and does not waive any right in whole or in part if no agreement is reached."

On July 7, R&H Bristol Site Manager Dan Hoyt sent Sharp a copy of the Union's effects agreement with R&H. The option election forms were tendered to the employees and returned to R&H by July 31. Hoyt testified that R&H could tender the option forms, as part of the effects agreement, because there was an agreement between R&H and the Respondent that the latter would offer employment to the people working in the AtoHaas unit. On July 31, Markert attended a meeting with R&H officials, and Respondent officials Sharp and Earle where a list of the names and number of employees who had signed the "Irrevocable Option Election Form," to accept employment with the Respondent was compiled. The list showed that 79 employees signed options to seek employment with the Respondent. Griffith testified that she also received this information. Griffith testified that as of June or July, there were about 100 R&H bargaining unit employees working in the AtoHaas area and that it was originally the Respondent's intent to employ between 92 and 104 maintenance and production employees at the Bristol site. However, this was an evolving figure and that the Respondent actually hired 18 mechanics and about 60 production employees.

Representatives of the Union and the Respondent held 16 bargaining sessions between July 15 and October 10. Markert testified that the parties made proposals for a new contract on July 15, and that the Union's initial proposal was that the Respondent accept the R&H contract. The Respondent disagreed. Markert testified that the proposals changed during the course of the negotiations and that each of the parties made proposals that differed from the terms of the existing R&H agreement.

There were bargaining sessions on October 6, 7, 8, 9, and 10. Sharp's credited and uncontradicted testimony revealed that before negotiations with the Union began during the week of October 6, Sharp spoke with R&H officials Hoyt and Milt Havens, a human resources representative. Sharp was informed that R&H's effects agreement with the Union was contingent on the Respondent and the Union reaching a contract. The R&H officials stated that if the Respondent did not reach an agreement with the Union by the November 1 expiration date of the service agreement between R&H and the Respondent, then R&H would remove its employees from the Respondent's site.

Sharp's credited testimony revealed that: When negotiations began between the Respondent and the Union on October 6, Wilcox told the Union that the parties needed to conclude negotiations and reach agreement by October 10 because the Respondent needed to secure a workforce since the service agreement with R&H for the provision of unit employees ended on November 1. Sharp told the Union that without a collective-bargaining agreement the Respondent was faced with the problem of operating the plant without a workforce.

The October 10 bargaining session was attended by Albert, Markert, Horton, Pofliet, and Chuck Knoll for the Union, and by Wilcox, Sharp, Griffith, Maribito, and Earle for the Respondent. Markert's credited testimony revealed that: The meeting began at around 9 a.m. with the Respondent tendering a revised written contract proposal to the Union, which the Union reviewed until around 10:30 a.m. Following the Union's partial review of the proposal, the parties began to discuss the grievance procedure. The only time limits in the grievance procedure in the R&H agreement were at the first step. However, the Respondent was proposing a 7-day time limit for each of the steps of the grievance procedure. During the meeting, the Union changed its position from calling for no time limits to allow for a 14-day time limit between each step of the procedure. The Respondent rejected the Union's counterproposal. Following this discussion, Wilcox stated that he did not believe that the Union had majority status and that the Respondent was interested in establishing a workforce. Wilcox cited the pending termination of the R&H service agreement to supply labor, and stated that negotiations would not continue until the Union achieved majority status. Wilcox ended the meeting at around 11 a.m.

On October 13, Albert faxed Wilcox a letter stating that the Respondent's unilateral ending of bargaining was unlawful, that the Union wanted to continue negotiations, and was ready to meet. Wilcox responded by fax, on the same date, wherein he denied that the Respondent was engaging in unlawful activity and stated that the need to obtain a work force was more pressing due to the pending expiration of the service agreement. It was stated that the Respondent was in the process of extending employment offers to the R&H employees, and if a majority accepted, the Union would be contacted in order to negotiate a new agreement.

On October 13, the Respondent tendered a letter under Sharp's signature offering employment to the R&H bargaining

demeanor, I note that Griffith's testimony was hazy and uncorroborated, and I do not find this portion of her testimony to be persuasive. Accordingly, I have credited the straight forward testimony and notes of the union officials as set forth above.

unit employees working in the Respondent's area of the Bristol plant. The letter informed the employees that their position would remain the same and their current wage rates would continue. It stated that, "Assuming that a majority of the hourly employees assigned to the Atoglas Plant unit accept" the employment offer the Respondent "will be negotiating with Local 88, United Steelworkers of America, toward a labor agreement." The employment offers outlined certain terms and conditions of employment under which the jobs were being offered. Concerning overtime, the offer read:

> Most of the overtime provisions you enjoy as a Rohm and Hass employee will be continued under Elf Atochem. Specifically, they are time and one-half base pay for time worked on a Sunday and holiday and time worked over eight hours in a work day and over 40 hours in a work week. If you work the seventh day in a work week, you'll be paid double time.

The employment offer gave an October 20 deadline for the employee's written acceptance and stated that employment for the Respondent would start on November 1. The October 13 offer outlined terms and conditions dealing with seniority, and "the Elf Atochem Flexible Benefits Program" relating to medical, dental, life insurance, and disability coverage. It also discussed retirement benefits and a 401(k) plan. The employees were to be integrated in the Respondent's insurance and pension plans, and they were to be given past service credit for their work at R&H regarding seniority as to pension, layoffs, recalls, and promotions.[13] On October 12 or 13, the Respondent sent a copy of the October 13 employment offers to the Union. By memo to R&H Bristol employees dated October 14, R&H Bristol Site Manager Hoyt, cited the Respondent's October 13 employment offers, and he predicted a layoff of about 94 employees at R&H if none of the employees accepted the Respondent's offer.

On October 21, Wilcox wrote Albert, noting that 81 R&H employees, a majority of the Respondent's Bristol work force, had accepted employment with the Respondent and that the Respondent recognized the Union as the representative for its Bristol employees and was prepared to meet with the Union to bargain a contract. Wilcox asked Albert to contact him to arrange a time to resume negotiations and Albert did so by letter dated October 23.

On November 2, R&H terminated its contract to supply labor to the Respondent at the Bristol facility and the Respondent began to directly employ production and maintenance employees. As of that date, it had on its Bristol payroll 78 production and maintenance workers, 74 of whom had previously worked for R&H at its Bristol site and had been represented by the Union. Horton and Pofliet, employees of the Respondent and former employees of R&H, credibly testified that the job classifications and duties of the former R&H employees did not change after they were employed by the Respondent on November 2, and that the product Plexiglas molding powder, the equipment, and the production process remained the same. The employees also reported to the same supervisors. Pofliet testified that he did not have to fill out a job application or interview before accepting employment with the Respondent.

Negotiations with the Union for a contract covering the Respondent's Bristol workforce resumed on November 17 and a collective-bargaining agreement was reached on August 16, 1999. Counsel for the General Counsel stated at the hearing that the General Counsel is only seeking a remedy for the unilateral changes alleged in the consolidated complaint for the period of November 2, 1998, to August 16, 1999, the date of the new collective-bargaining agreement.

B. Credibility

Sharp testified as follows: Between October 13 and 21, Sharp spoke to more than half of the R&H Atoglas dedicated employees about coming to work for the Respondent. Many of these employees were concerned about overtime relating to the Respondent's October 10, contract proposal. Sharp testified that he told the employees that the Respondent was offering employment based on what was on the table on October 10, and that if a majority of employees represented by Local 88 accepted employment, then the Respondent would resume negotiations with its October 10 offer serving as a starting point. Sharp testified that he had a similar conversation with every employee he spoke with, although the employees expressed different concerns to him. Sharp named 14 employees with whom he could recall having these conversations, including Local 88 officials Horton and Pofliet. However, when he was asked for the specifics of his conversations with Horton and Pofliet, Sharp's testimony differed from the claims he had made concerning his overall discussions with the employees. Rather, Sharp testified that his conversations with the two union officials were generally about which of the R&H employees were likely to work for the Respondent. Sharp described another conversation with an employee named Bruce Jones. He testified that he told Jones, along with several others who were there, "that you had to make the decision based on what you knew, and they knew a lot, and you needed to understand that, you know pending the outcome of who selected and who didn't come, that we would resume negotiations." Based on the foregoing, and on consideration of Sharp's demeanor and his ability to recall, I have concluded that Sharp's conversations with employees during this time period varied, and were not as specific as he claimed. Moreover, I do not credit Sharp's claim that he told at least half of the employees that the Respondent was offering employment based on the Respondent's outstanding offer to the Union at the bargaining table. I have concluded that Sharp exaggerated the extent and nature of his conversations to bolster the Respondent's cause at the unfair labor practice proceeding. I also note that Sharp did not include such a statement to employees in his October 13 letter offering them employment.

I have also considered Markert's testimony that between October 10 to November 1, union officials met with employees and explained the Respondent's October 10 contract proposal. However, there was no testimony by Markert that he was told or that he conveyed to employees that the Respondent was

[13] Counsel for the General Counsel contends in his posthearing brief that the Respondent's October 13 offer did not address the terms and conditions of employment alleged as unilateral changes in the consolidated complaint.

implementing its final offer as the basis for their initial terms and conditions of employment.

C. Positions of the Parties

The General Counsel contends that the Respondent is a successor to R&H, and as such it had an obligation to bargain with the Union. It is contended that a change in stock ownership does not normally alter a corporation's obligations under the Act. That is particularly so here, where the Respondent continued to make the same product, with the same production process and equipment, the same employees occupied the same job classifications, performed the same functions, and reported to the same supervisors. It is contended that an asset transfer is not a prerequisite to a successorship finding.

The General Counsel asserts that, under current Board law a successor, has an obligation to bargain initial terms whenever it indicates an intent to employ predecessor employees without simultaneously making clear to the employees that employment will be on terms different from those offered by the previous employer. Here, beginning on January 27, and throughout the period following the announcement of the Respondent's intent to acquire AtoHaas' stock, it was made clear to the R&H employees assigned to AtoHaas that the Respondent and AtoHaas intended to retain them. It is also argued that the assurances of employment were not accompanied by an announcement of concrete changes in terms of employment. The announcements that the employees would receive equivalent salaries and "comparable benefits" were not sufficiently clear that the Respondent intended change benefits to absolve the Respondent of its obligation to bargain with the Union over the employees' initial terms of employment. Therefore, the Respondent was a "perfectly clear" successor to R&H with an obligation to bargain on and after January 27, 1998.

It is argued in the alternative that, at the June 10 meeting, the Respondent informed the Union that it would adhere to the provisions of the R&H contract while a new agreement was being negotiated. In July, a majority of the R&H AtoHaas dedicated employees signed forms indicating that they would accept employment with the Respondent. R&H provided the Respondent and the Union with this information. At a minimum, the Respondent incurred a bargaining obligation with the Union as of July 31. The General Counsel also contends that the changes set forth in the Respondent's October 13 employment offer to R&H employees are different from those alleged as unlawful in the consolidated complaint, that the changes set forth in the complaint were made after the employees were hired by the Respondent and the Union was recognized on October 21, and that the Respondent was not privileged to alter these terms and conditions of employment of the unit employees without first bargaining with the Union. It is argued that while the parties were involved in contract negotiations prior to November 2, there was no impasse in negotiations that would privilege the Respondent to unilaterally set the terms of the employees' employment.

The General Counsel asserts that, as a final alternative, the Board should reverse *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. 529 F.2d 516 (4th Cir. 1975), and find that an obligation to bargain exists over initial terms of employment whenever a successor plans to retain the existing workforce without regard to whether changes in employment conditions are contemplated or when they are announced. The General Counsel cites *NLRB v. Advanced Stretchforming, Inc.*, 208 F.3d 801, 807–811 (9th Cir. 2000); Chairman Gould's concurring opinion in *Canteen Co.*, 317 NLRB 1052, 1054–1055 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997), and the dissenting opinions of Board Members Fanning and Penello in the *Spruce Up* decision as support for the position that the case be reversed. The General Counsel argues that the Respondent committed, as part of its agreement to purchase R&H's stock, to offer employment to all union presented workers in the AtoHaas area of the plant.[14]

The Respondent argues that it is not a successor to R&H because it neither purchased the portion of the R&H business that employed the unit employees, nor did it succeed R&H in a contract for services involving those employees. The Respondent contends that the Board has limited a successorship finding to these two types of business transactions. It also contends that there is no substantial continuity between R&H and the Respondent's operations. The Respondent explains that it did not purchase any part of R&H's business. Rather, it merely purchased stock in the AtoHaas joint venture which did not employ any of the production and maintenance employees covered by the Union's contract with R&H. Moreover, R&H continued to employ those employees for 5 months after the purchase was completed. The Respondent contends that since it did not purchase the business that previously employed the unit employees, it is not a successor to R&H, and it had no obligation to bargain until it recognized the Union in October 1998. The Respondent also asserts that it did not succeed R&H on a contract for the performance of services. R&H initially contracted with the Respondent to continue to furnish Atoglas with production and maintenance employees. However, the Respondent did not assume that or any other R&H contract. Rather, after the services agreement ended, the Respondent directly employed the production and maintenance employees.

The Respondent also contends that it is not a successor because R&H and the Respondent are not engaged in the same business. R&H manufactured acrylic emulsions and industrial polymers, and leased employees to AtoHaas. The Respondent's Atoglas division, where the production and maintenance employees now work, manufactures Plexiglas, as did the joint venture prior to June 4. During the service agreement, R&H management administered all issues related to terms and conditions of employment contained in the R&H collective-bargaining agreements covering the workers at Atoglas. Also R&H's customers were different from those of the Respondent. R&H supplied employees to the joint venture, therefore, its product was its employees and its customer was the joint venture. While the Respondent manufactures and supplies Plexiglas.

[14] Concerning the General Counsel's argument that the Board's rationale in *Spruce Up Corp.*, supra, should be reversed, I am bound by current Board law. See *Ford Motor Co.*, 230 NLRB 716, 718 fn. 12 (1977), enfd. 571 F.2d 993 (7th Cir. 1978), affd. 441 U.S. 488, 493 fn. 6 (1979). I also see no need to address this contention in view of my findings and conclusions in this decision.

The Respondent contends that even assuming that it is a successor, it is not a "perfectly clear" successor under Board law, and it had no obligation to bargain with the Union until October 21 when it recognized the Union. It states that it expressed a willingness to hire the employees as early as January, but it indicated in its first meeting with the Union on June 10, that it would not adopt the Union's R&H contract. The Respondent, by Pelliciari's February 18 letter, informed the employees that it was developing their compensation and benefit plans, thereby notifying them that their terms and conditions would differ from those in the Union's contract with R&H. The letter did not state that the plans would be the same, but that they would only be substantially equivalent to the terms with R&H. There were 16 bargaining sessions between June and October, and by negotiating for a new contract the Respondent made it clear that it intended to employ the employees under different terms than at R&H. It is asserted that the Respondent's final proposal on October 10 contained all of the changed terms and conditions under which the employees were hired. The evidence reveals that Markert communicated these terms to the production and maintenance employees, and that Sharp, the Atoglas plant manager, directly informed the employees that the Respondent's employment offer included these terms. Thus, the Union and the employees knew that their terms were changing before they were hired.

The Respondent argues that under the letters of intent and irrevocable option forms that the employees signed in July, they could not be hired by the Respondent unless it reached an agreement with the Union. As late as October, R&H threatened to remove the employees from Atoglas on November 1. It was only after October 10, when R&H rescinded the provision in the effects agreement with the Union requiring the Respondent and the Union to reach a collective-bargaining agreement, did it become perfectly clear that the unit employees would have a chance to work for the Respondent.

It is contended that even assuming that the Respondent was a "perfectly clear successor" when it first expressed an intent to hire the employees, it was free to unilaterally implement the terms and condition of their employment in October 1998 because the Respondent and the Union had reached impasse. There were 16 bargaining sessions between June and October 10. Under the R&H effects agreement with the Union the validity of the employees' irrevocable option agreements were conditioned on the Respondent and the Union reaching a contract. In early October, R&H notified the Respondent that if no agreement was reached, it would remove its employees from Atoglas on November 1. As a result, the Respondent told the Union that negotiations would end on October 10 and on that day the Respondent submitted its final offer. At that point, the parties had reached impasse, and the Respondent was free to impose the terms and conditions of its final proposal. It is also asserted that due to the pending termination of the service agreement with R&H, there was an "economic exigency" for the Respondent and that under Board law it was privileged to implement its offer even if there was no bargaining impasse.

D. Analysis and Conclusions

1. Successorship

a. The stock transfer issue

It is alleged in paragraph 5(k) of the consolidated complaint that the "Respondent has continued (as) the employing entity and is a perfectly clear successor to R&H and the AtoHaas joint venture." However, the General Counsel asserts for the first time at page 18 of its posthearing brief that some of AtoHaas stock was purchased by Elf S.A. and the Company was renamed Atoglas and made a division of Elf. "But, these transactions did not alter the continuing legal entity or effect AtoHaas/Atoglas's rights and obligations." It is argued there that, "A change in stock ownership normally does not alter a corporation's obligations under the Act. Even a modification in the corporate name coinciding with the stock transfer does not absolve the corporation of its responsibilities."

In *NLRB v. Burns Security Services*, 406 U.S. 272, 291 (1972), the Court stated concerning the obligations of a successor employer that:

> In many cases, of course, successor employers will find it advantageous not only to recognize and bargain with the union but also to observe the preexisting contract rather than to face uncertainty and turmoil. Also, in a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchase, the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract.

The Board and courts have distinguished between acquisitions involving stock transfers and ordinary successorship cases and have concluded that in stock transfers the purchaser is required to recognize and bargain with the employees' union representative before making any changes in unit employees terms and conditions of employment and to honor any existing collective-bargaining agreement for the term of that agreement. See *Children's Hospital*, 312 NLRB 920, 927 (1993), enfd. 87 F.3d 304 (9th Cir. 1996); *Rockwood Energy & Mineral Corp.*, 299 NLRB 1136, 1139 (1990), enfd. 942 F.2d 169 (3d Cir. 1991); and *EPE, Inc.*, 284 NLRB 191 (1987), enfd. in relevant part 845 F.2d 483 (4th Cir. 1988). In both *Rockwood Energy & Mineral Corp.*, supra, and *Towne Plaza Hotel*, 258 NLRB 69, 75 (1981), the Board affirmed the judge's finding that the acquisitions in those cases were stock transfers rather than successor relationships, although both the General Counsel and the respondent argued in both cases in terms of whether the respondent was a successor employer. In this regard, the secondary criteria relied on by the Board for a determination of a stock transfer and successorship are very similar. See *Hendricks-Miller Typographic Co.*, 240 NLRB 1082, 1083 fn. 4 (1979), where the Board stated that the "'secondary characteristics' of a successor are often identical to those of a stock transfer."

In *Children's Hospital*, supra, the merger of two hospitals was found to be akin to a stock transfer, although there was a name change as a result of the merger. The employees and the union there were accorded rights based on a stock transfer type finding. It was stated in *Children's Hospital*, supra at 927, that,

"Moreover, the essential inquiry, in these types of cases, is whether operations, as they impinged on bargaining unit members, remained essentially the same after the transfer of ownership. *Phil Wall & Sons Distributing*, 287 NLRB 1161 at fn. 1, 1165 (1988)." See also *Grainger Bros. Co.*, 146 NLRB 609 (1964), where changes in ownership and a corporate name did not warrant a finding that there was a change in an employing enterprise.

It has been held that not all transactions involving the sale of stock will accord a union recognized by the predecessor employer with contract rights or the right to bargain over initial terms of employment with the successor employer. In *Food & Commercial Workers Local 152 v. NLRB*, 768 F.2d 1463 (D.C. Cir. 1985), the court noted that although an acquisition occurred through a sale of stock, the record there revealed "much more than there mere substitution of one owner for another through a stock transfer within the context of an ongoing enterprise." It was pointed out that the transfer of corporate ownership rendered the employer as an integrated subsidiary of a much larger corporate organization. There the transfer was also accompanied by the initial closure of the plant, and some alteration of the business operation. The court, in a decision later adopted by the Board, concluded that, although the acquisition was not a stock transfer, a successorship finding was warranted. See *Sterling Processing Corp.*, 291 NLRB 208, 210 (1988).

In *Rockwood Energy & Mineral Corp.*, supra at 1139–1140, the Board found that the respondent corporations there constituted a single employer, and that the transaction there, although complex, was a stock transfer which occurred during the life of a collective-bargaining agreement requiring the respondents to be bound by that contract during its term. There the predecessor employer's financial and administrative matters were assumed by its purchasers REMCO and RHC, which were part of a highly integrated corporate entity. Yet, it was concluded that the transaction was a stock transfer because the predecessor's status as a corporation and as an employing entity was maintained in that the mining operations continued with the same superintendent and under the same name. However, the Board also set forth an alternative to its stock transfer theory in *Rockwood Energy*, supra at 1140, holding that RMC and REMCO constituted a successor employer that had adopted Harmony's collective-bargaining agreement, and therefore, had violated Section 8(a)(5) of the Act by its unilateral conduct.

The facts here reveal that AtoHaas was a separately incorporated joint venture, with R&H the majority and Elf S.A. the minority stock owners. The parties stipulated that on June 4, R&H sold all of its stock in AtoHaas to the Respondent, a wholly owned subsidiary of Elf S.A. and that the agreement for sale was between R&H and Elf S.A. On June 10, Elf S.A. changed AtoHaas' name to Atoglas. At the time of the stock sale, AtoHaas had no unit employees on its payroll. Rather, the bargaining unit employees were employed by R&H, the majority owner of the AtoHaas joint venture, and were performing work solely related to the joint venture's production process both before and after the sale. There was no hiatus in operations here, and following the stock sale and their eventual transfer to the Respondent's employ on November 2, the unit employees retained their seniority acquired at R&H, were hired at the same salaries, and performed the same work under the same supervisors.

While AtoHaas' name was changed to Atoglas and it was made a division of Elf S.A. following the sale, I do not view this as sufficient to preclude a finding of a stock transfer here. The *Children's Hospital*, supra, and *Rockwood Energy & Mineral Corp.*, supra, decisions demonstrate that the corporate configurations at the time of the sale are not necessarily determinative as to whether a stock transfer finding is warranted. Here the operations "as they impinged on bargaining unit members, remained essentially the same after the transfer of ownership." *Children's Hospital*, supra at 927. In this regard, Sharp noted in a July 30 memo to Atoglas salaried employees informing of them of the status of the Respondent's negotiations with the Union that, "Our approach during negotiations is to establish the Atoglas plant as a separate, efficient, and effective operation while maintaining many of the practices that employees enjoy." Despite the name change and integration of Atoglas into Respondent's larger corporate structure for pension and insurance purposes, I have concluded that the sale was but a stock transfer to the prior minority owner of the joint venture in the eyes of the employees. As such, the Respondent was required to assume the predecessor's collective-bargaining agreement, and violated Section 8(a)(5) of the Act by making the unilateral changes alleged in the complaint. The fact that the Union may have acquiesced in certain changes in the Respondent's insurance and pension benefit packages would not preclude it from challenging other unilateral actions by the Respondent. See *Georgia Power Co.*, 325 NLRB 420, 421 fn. 9 (1998). I would note that during the first bargaining session with the Respondent on June 10, it was the Union's position that the Respondent should adhere to the R&H contract.

As set forth above, while a transaction might be viewed by the Board as a "stock transfer" this does not preclude an alternative successorship theory for an 8(a)(5) finding. See *Rockwood Energy & Mineral Corp.*, supra at 1140. I have concluded, should the Board disagree with my conclusion that the acquisition here was a stock transfer that, for the reasons set forth below, the Respondent is a "perfectly clear" successor as alleged in the consolidated complaint which brings forth the same remedy in the circumstances here as would a "stock transfer" finding.

b. The successor issue

In finding that a respondent is a successor employer the Board looks to such factors as whether business operations continue with "the same employee workforce doing the same jobs under the same working conditions" so as to establish a "substantial continuity" in operations. See *Western Paper Products*, 321 NLRB 828, 829 (1996), enfd. in relevant part 153 F.3d 289 (6th Cir. 1998). In *ATS Acquisition Corp.*, 321 NLRB 712, 722 (1996), enfd 127 F.3d 1105 (9th Cir. 1997), citing the Supreme Court's decision in *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), additional factors for successorship were noted to also include whether employees were working under the same supervisors, using the same production process, and producing the same products for the same customers. It was stated in *ATS Acquisition Corp.* supra at 722, that

the Court in *Fall River* instructed that the characteristics of "substantial continuity of operations". . . "were to be assessed primarily from the perspective of the involved employees." In *Food & Commercial Workers Local 152 v. NLRB,* 768 F.2d at 1470, the court explained as to successorship that, "[T]he focus of the analysis, in other words, is not on the continuity of the business structure in general, but rather on the particular operations of the business as they affect members of the relevant bargaining unit."

I have concluded that the facts here warrant a finding that the Respondent is a successor employer concerning its production and maintenance employees formerly employed by R&H at the Bristol facility. The evidence reveals that prior to R&H's sale of AtoHaas stock to the Respondent, there were approximately 100 of R&H's employees of a 600 person bargaining unit dedicated to the AtoHaas' operation. Griffith testified that on the June 4 sale date, the salaried employees of R&H dedicated to the joint venture, including managers and supervisors became employees of the Respondent at the Bristol facility. Included in the Respondent's new hires were the four individuals who Sharp referred to as the "management team" at the Bristol facility, that is Sharp, Griffith, Maribito, and Earle. At that time, the R&H bargaining unit employees dedicated to the joint venture began to receive their work assignments, direction, and training from the Respondent's newly hired supervisory staff, who had formerly been employed in the same capacity by R&H. The R&H collective-bargaining agreements remained in effect for the unit employees although they were still administered by R&H personnel.

On November 2, the R&H contract to supply labor to the Respondent at the Bristol facility ended and the Respondent began to directly employ production and maintenance employees at the site. As of that date, it employed 78 production and maintenance workers, 74 of whom had previously been R&H union represented employees at Bristol. The credited testimony reveals that the job classifications and duties of the former R&H employees did not change after they were employed by the Respondent, and that the product Plexiglas molding powder, the equipment, and the production process remained the same. The employees also reported to the same supervisors. Pofliet testified that he did not have to fill out a job application or interview before accepting employment with the Respondent. A memo had previously been issued to the employees stating that "The intellectual property related to PMMA and all trademarks will be included in the sale. (Plexiglas, Oroglas, Tuffak)." The foregoing discussion reveals that the former R&H unit employees were hired by the Respondent in circumstances that plainly meet the Board's traditional successor criteria.

I do not find the cases cited by the Respondent require a different result. For example, the Respondent cites *Harter Tomato Co.,* 321 NLRB 901 (1996), enfd. 133 F.3d 934 (D.C. Cir. 1998), at page 10 of its posthearing brief for the proposition that the Board has found "employers to be successors in only two types of cases: (1) where employers have purchased part or all of a predecessors' business; and (2) where employers have succeeded a predecessor employer on a contract for the performance of services." In fact, *Harter* stands for quite the opposite result. In *Harter* the respondent successor employer leased a facility from another entity that had purchased it from the predecessor employer. The respondent employer hired the majority of its workforce from the predecessor's employees and began operations similar in nature to the predecessor employer. The Board stated that, "We find that the direct transfer of assets to the successor is not a prerequisite to such status." Id. at 901. The Board stated in *Harter* at page 902, that:

> Typically, the question of successorship in Board cases has arisen in the context of two categories of cases: (1) those in which the employer has purchased all or part of the predecessor employer's business; and (2) those in which the employer has succeeded the predecessor employer on a contract for the performance of services. The existence of the second category of cases is an obvious indication that a successor's ownership of the predecessor's business, or its acquisition of all the predecessor's assets, is not crucial to the determination of a Burns successorship status. When the employees work in the same plant using the same equipment and production processes, consideration of who technically owns the property used would not likely influence the employees' sense of continuity in the enterprises. [Footnotes omitted.]

In the instant case, R&H's employees were leased to AtoHaas where they were engaged in the production of Plexiglas. When the Respondent, a minority shareholder in AtoHaas, purchased R&H's stock in AtoHaas it produced the same product the employees had previously been working on, used the same equipment, the same production process, hired the R&H supervisors and management team, and there was no break in the employees' employment. Clearly, there was a "substantial continuity" between the two enterprises from the employees' perspective and a successorship finding is warranted. See *Western Paper Products,* supra, and *ATA Acquisition Corp.,* supra.[15]

c. The Respondent is a "perfectly clear" successor

In *Hilton's Environmental, Inc.,* 320 NLRB 437, 438 (1995), the Board stated that:

> It is well settled that [a]lthough a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.
>
> *NLRB v. Burns Security Services,* 406 U.S. 272, 294–295 (1972). In *Spruce-Up Corp.,* 209 NLRB 194, 195 (1974), enfd. 529 F.2d 516 (4th Cir. 1975), the Board stated that the Burns "perfectly clear" caveat should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees

[15] The fact that only a portion of the 600 person R&H bargaining unit transferred over to the Respondent does not preclude a successorship finding. "It is well settled that a mere diminution in the size of a successor's unit, as compared with that of the predecessor's, does not 'change the nature of the (employing entity) so as to defeat the employees' expectation in continued representation by their union.'" See *Lincoln Park Zoological Society,* 322 NLRB 263, 265 (1996), enfd. 116 F.3d 216 (7th Cir. 1997).

> into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.
>
> . . . .
>
> Applying these principles to the facts of this case, we find that the "perfectly clear" caveat is applicable in this case. Thus, as discussed above, the Respondent had solicited applications from the employees on September 8, and had assured them the following day that all would be hired unless some problem arose as a result of information disclosed on their applications or in the interview process. Contrary to the Respondent, there was no clear announcement at this time that it intended to establish new terms and conditions of employment. See *Fremont Ford*, 289 NLRB 1290 (1988) (employer told union it had doubts about retention of only a few unit employees; employer's stated desire to change seniority and institute a flat rate insufficient to indicate intent to establish new employment conditions).

In *Canteen Co.*, 317 NLRB 1052 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997), the new company, prior to assuming control of operations on July 1, 1992, personally contacted the predecessor employees to say that it wanted them to apply for employment. It was noted that the respondent also had several discussions with the union representing the predecessor's employees in June concerning its desire to establish a new job classification. The parties discussed the sample contract they would use to begin negotiations for a new collective-bargaining agreement. On June 22, the respondent told the union that it wanted the predecessor's employees to serve a probationary period and the union agreed. On that date, the parties agreed to meet on June 30 to negotiate a collective-bargaining agreement. In its discussions with the union, the respondent did not mention anything about making any changes in the initial terms and conditions and the Board, stated:

> We agree with the judge that the Respondent violated Section 8(a)(5) of the Act when, on or after June 23, the Respondent told three of the four predecessor employees that they could continue working the food services operation, but at significantly reduced wages. Specifically, we find that by June 22, when the Respondent expressed to the Union its desire to have the predecessor employees serve a probationary period, the Respondent had effectively and clearly communicated to the Union its plan to retain the predecessor employees. Therefore, as it was "perfectly clear" on June 22 that the Respondent planned to retain the predecessor employees, the Respondent was not entitled to unilaterally implement new wage rates thereafter.

As contended by the General Counsel, the facts and the Board's findings in *Hilton Environmental*, supra, and *Canteen Co.*, supra, demonstrate that an actual offer of employment is not required to establish the "perfectly clear" successor's obligation to bargain. Rather, it has an obligation to bargain over initial terms of employment when it displays an intent to employ the predecessor's employees without making it clear to those employees that their employment will be on terms different from those in place with the predecessor employer. See also *Helnick Corp*, 301 NLRB 128, 134 (1991); *Turnbull Enterprises*, 259 NLRB 934, 938–940 (1982); and *CME, Inc.*, 225 NLRB 514 (1976).

In the instant case, on January 26, Local 88 President Markert, along with Local 88's wage committee, attended a meeting with Caesar, the president of AtoHaas; Sharp, AtoHaas area manager; Vassiliou, R&H vice president; and Fratini, R&H Bristol site manager. Local 88 was told of R&H's intent to sell its interest in AtoHaas to Elf Atochem. Caesar stated, at the meeting, that it was Elf Atochem's intent to employ all of the unit employees dedicated to AtoHaas in the future.

The R&H bargaining unit employees were the recipients of several announcements on January 27 and 28. On January 27, there was a press release stating that Elf S.A. would purchase R&H interest in AtoHaas. On that date, separate memos to the employees issued, one under the signatures of Caesar and Vassiliou and the other under the signatures of Sharp and Fratini. The memos had an identical attachment containing questions and answers for employees. The memos stated that R&H had reached an agreement in principle to sell its share of AtoHaas to joint venture partner Elf Atochem. The question and answer portion of the memos read in pertinent part, that: "Elf Atochem will provide employment to all of the existing workforce dedicated to the AtoHaas business," and that "Elf Atochem will recognize employees' past years of service with AtoHaas and Rohm and Haas, and will provide employees with equivalent salaries and comparable health, welfare and benefits package, including pension, savings plan and vacation." On January 28, a memo under the signature of Bernard Azoulay, president and CEO of the Respondent and Francoise Perior, directeur general adjoint of Elf Atochem was distributed to the relevant R&H unit employees. The memo stated, in pertinent part, "We want to assure you that we value all of the employees dedicated to the AtoHaas business and expect that all of you will join with us to fulfill our goals of becoming one of the most successful polymer companies in the world."

The Respondent has denied Caesar and Vassiliou's agency status in its answer to the consolidated complaint, but admitted in its answer that Sharp was its supervisor and agent at all material times herein.[16] In *Helnick Corp*, supra, the Board affirmed the judge's findings that an individual became an agent of a successor employer for certain conduct prior to the time that the individual finalized his business relationship with the successor. The judge found that in the circumstances there, the respondent held the individual out as an agent to the employees.[17] In *American Press*, 280 NLRB 937, 951 (1986), enfd. 833 F.2d 621 (6th Cir. 1987), it was stated that:

> The Board, however, holds that strict rules of respondent superior are not applicable to determine whether an employer

[16] While the Respondent conceded Sharp's agency status in its answer, he was not formally hired by the Respondent until June 4, so I have discussed Sharp's status along with Caesar's as of January 1998.

[17] See also *Advance Stretchforming International, Inc.*, 323 NLRB 529, 536 (1997), enfd. in relevant part 208 F.3d 801 (9th Cir. 2000).

> can be charged with the actions of an agent, and it need not be shown that the actions were authorized or ratified. *Pepsi-Cola Bottling Co.*, 242 NLRB 265, 269 (1979). The test rather is whether, under all the circumstances, employees could reasonably believe the person whose status is at issue reflects company policy and is speaking and acting on behalf of management. *Aircraft Plating Co.*, 213 NLRB 664 (1974); *Montgomery Ward & Co.*, 228 NLRB 750 (1977).[18]

I have concluded that both Caesar and Sharp were statutory agents for the Respondent in January at the time of the issuance of these memos and during the described conversations. In this regard, Caesar retained the title as president of AtoHaas at the time of the June 4 sale, and he became president of Atoglas at the time of the name change until he retired in July 1999. Sharp was the only individual employed and paid by AtoHaas working at the Bristol facility at the time the sale was announced. Sharp testified that he, along with Griffith, met with Respondent officials Pelliciari and Rebeille around January 27, and they were told that the Respondent intended to offer them employment when it purchased AtoHaas. I have concluded that Sharp would not have issued the detailed memo to the employees in question and answer form on that same date unless he was expressly authorized to do so by the Respondent's upper level officials. In this regard, Griffith, who was hired by the Respondent on June 4 as human resource manager, testified that as of January it was her understanding that the Respondent was prepared to offer employment to all AtoHaas area bargaining unit employees. Moreover, Sharp admitted that beginning around February he had numerous discussions with Respondent officials Pelliciari, Rebeille, and Wilcox, where it was stated that it was in the Respondent's interest to provide employment to the hourly employees at the jobsite. Horton also testified that in early February, Sharp told him that, following the sale, Sharp expected to stay as plant manager and that the Respondent "was going to offer employment to all of the people that were in the unit." Caesar and Sharp's statements were confirmed by the January 28 memo to unit employees from Azoulay, president and CEO of the Respondent. Finally, both Caesar and Sharp were officials of AtoHaas at the time of their statements, and the Respondent owned 49 percent of the shares of stock in AtoHaas at the time the statements were made. It is clear that it would have been reasonable for the employees to assume that these individuals were speaking for R&H and the Respondent at the time these statements were made announcing a sale of stock between the two companies and that the Respondent intended to retain their services.

The facts here reveal that there was an agreement between R&H and the Respondent that, as part of its purchase of R&H's stock in AtoHaas, the Respondent would offer employment to all of the R&H unit employees whose work had been dedicated to the AtoHaas operation. R&H Bristol Site Manager Hoyt's testimony was uncontradicted that there was such an agreement and the above described January 27 and 28 memos and postings to employees informed them of that agreement as did the later responses to the information requests to the Union from R&H, one of which was copied to the Respondent. Moreover, bonuses to employees under the effects agreement negotiated between R&H and the Union were conditioned on employees accepting employment with the Respondent. The Respondent was provided with a copy of the effects agreement and the results of the survey from the unit employees revealing that as of July, a majority of them had intended to work for the Respondent.

I have therefore concluded that the Respondent's bargaining obligation attached on January 27, when the Respondent's agents informed the employees that "Elf Atochem will provide employment to all of the existing workforce dedicated to the AtoHaas business," and that "Elf Atochem will recognize employees' past years of service with AtoHaas and Rohm and Haas, and will provide employees with equivalent salaries and comparable health, welfare and benefits package, including pension, savings plan and vacation." The term "comparable" used in the Respondent's message was not specific enough to clearly inform employees of the nature of the changes which Respondent intended to institute in the future. See *Helnick Corp*, supra; *Hilton's Environmental*, supra; *Canteen Co.*, supra; and *East Belden Corp.*, 239 NLRB 776, 793 (1978), enfd. 634 F.2d 635 (9th Cir. 1980), a successorship case where a bargaining obligation attached over the employees' initial terms of employment where it was noted that, "the predecessor's employees, when offered continued employment by the Respondent, were not clearly informed of the nature of the changes which Respondent intended to institute in the future, rather Respondent's announcement was couched in generalized and speculative terms."[19]

I have also concluded that the Respondent mislead the Union and therefore the unit employees by Wilcox's March 17 letter and statements at the June 10 negotiation session informing the Union that the Respondent would keep the R&H terms and conditions of employment and collective-bargaining agreements in effect until the parties negotiated a replacement contract. The parties had 16 negotiations between July and October 10, although the unit employees were not hired by the Respondent until October 21. Thus, despite its protestations in its posthearing brief that it was not a successor employer and that it retained the right to set initial terms of employment without first bargaining with the Union, the Respondent engaged in a course of conduct suggesting that it was aware of its bargaining obligation. There is no evidence that, during this time, the Respondent retracted Wilcox's promise to the Union to keep the R&H agreements in effect. As the Board stated in *Spruce*

[18] See also *Shen Automotive Dealership Group*, 321 NLRB 586, 593 (1996).

[19] The Respondent, in its brief, places great emphasis on Pelliciari's memo of February 18, wherein it reiterates the Respondent's intent to offer the unit employees jobs, but also stated that the Respondent was working to design appropriate (benefit) programs claiming it thereby notified the employees that it did not intend to use R&H programs. I reject this argument for several reasons. First, the memo issued after January 27, the date that the Respondent's bargaining obligation had attached under the applicable case law. Second, the February 18 memo was ambiguous as to what terms of employment the Respondent intended to change. Finally, Griffith, whose responsibility was to have the memo distributed, testified that she was unsure of whether the memo was sent to bargaining unit employees.

Up Corp., 209 NLRB 194, 195 (1974), enfd. 529 F.2d 516 (4th Cir. 1975), a successor employer acquires an obligation to bargain over the employees initial terms of employment when it misleads them into believing that they would be hired under their prior terms and conditions of employment. Here the Respondent mislead the employees with the representation to the Union that the prior terms and conditions of employment would remain in effect until such time as the Respondent negotiated a new collective-bargaining agreement with the Union. In this regard, at the time of Wilcox's March 17 letter and his remarks at the June 10 negotiation session both of the parties anticipated that the Union would remain the representative of the unit employees when they were hired by the Respondent. Therefore, Wilcox's communications to the Union constituted communications to the employees through their representative. See *Marriott Management Services*, 318 NLRB 144 fn. 1 (1995). Thus, Wilcox's statements to the Union that the Respondent would keep the R&H collective-bargaining agreements in effect until a new contract was negotiated served to mislead employees as to their initial terms of employment. In these circumstances, the Respondent could not unilaterally set the employees' initial terms of employment without violating Section 8(a)(5) of the Act.

Cases cited by the Respondent do not require a different result. In *Spruce Up Corp.*, supra, the respondent told the union that he intended to hire all of the predecessors' employees, but the union was also told in the same conversation that these employees would be paid at different rates which were disclosed during the conversation. In *Marriott Management Services*, supra, the respondent informed the union that it did not intend to abide by the predecessor's collective-bargaining agreement prior to notifying the union that it intended to hire the predecessor's employees. The union and the respondent had also reached agreement on changes in the health and welfare package and the pension plans prior to the respondent's announcement that it intended to hire the respondent's employees. In *Banknote Corp. of America.*, 315 NLRB 1041 (1994), enfd. 84 F.3d 637 (2d Cir. 1996), cert. denied 519 U.S. 1109 (1997), the respondent, a successor employer, sent the charging party unions a letter stating that it would attempt to hire its initial workforce from the predecessor's employees, but that it was not making a commitment to recognize the unions or to be bound by their collective-bargaining agreements. Thereafter, prior to its hiring employees, the respondent informed the union's of certain specified changes in working conditions that it intended to implement and the Board concluded that the respondent was not a perfectly clear successor. In *Banknote Corp*, the Board concluded that the respondent was obligated to bargain over any changes in the employees' terms and conditions of employment that were not announced prior to the employees' hiring.

The Respondent also contends that even assuming that it was a "perfectly clear" successor, it was free to implement the terms and conditions of employment in October because the Union and the Respondent had reached an impasse in bargaining. In *Grand Auto*, 320 NLRB 854, 857 (1996), the following principles were set forth concerning the meaning of a bargaining impasse:

> An impasse occurs when 'good faith negotiations have exhausted the prospects of concluding an agreement,' that is, whenever negotiations reach a point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete*, 484 U.S. 539, 543 (1988). After an impasse has been reached on one or more subjects of bargaining, an employer may implement any of its preimpasse proposals. *Western Publishing Co.*, 269 NLRB 355 (1984).
>
> In *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968), the Board listed the following factors to determine whether an impasse has been reached:
>
> > The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of the negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.
>
> Since impasse is a defense to a charge of an unlawful unilateral change, the burden of proof rests on the party asserting that impasse exists. *North Star Steel Co.*, 305 NLRB 45 (1991); *Roman Iron Works*, 282 NLRB 725 (1987).

The credited evidence reveals that the parties had 16 negotiation sessions between July 15 and October 10, and that there were five sessions held between October 6 and 10. During the October 6 session, the Union was informed that it was the Respondent's position that parties would have to reach an agreement by October 10, because the Respondent's service agreement with R&H ended on November 1, and the Respondent needed to secure a workforce to operate the plant. However, very little evidence was placed in the record about the substance of the negotiations. The record revealed that the Respondent tendered to the Union a new written proposal on the morning of October 10 at around 9 a.m., which the Union reviewed until 10:30 a.m. at which time it made a counterproposal concerning the grievance procedure which contained movement from its prior position. At that point, at around 11 a.m., the Respondent abruptly ended negotiations. There was no showing as to what, if any, issues the parties were deadlocked, or that continuing negotiations even for the remainder of the day would not have been fruitful. In fact, since the Respondent had presented a new proposal that day which generated movement from the Union on the grievance procedure the evidence suggests that a give and take in bargaining was still taking place. I have also concluded that the Respondent had mislead the Union by twice announcing that the R&H agreement would remain in effect until the parties reached a new contract. The Union was entitled to rely on that representation as to the manner in which it approached negotiations. This misrepresentation undercuts any claim by the Respondent that it had bargained in good faith with the Union to an impasse and therefore could implement its final offer. I would note that the

parties had not even had an opportunity to fully discuss the Respondent's final offer before it removed itself from the bargaining table on the morning of October 10. The Respondent has not met its burden of proof of showing an impasse here.

The Respondent asserts at page 21 of its brief that, even if an impasse had not been reached, it "was free to unilaterally implement its last proposal under the 'economic exigency' doctrine." In *Naperville Ready Mix, Inc*, 329 NLRB 174, 182–183 (1999), it was stated that:

> The Board has held that when parties are engaged in negotiations for a collective-bargaining agreement an employer's obligation to refrain from unilateral changes encompasses a duty to refrain from implementation unless and until an overall impasse has been reached on bargaining for the agreement as a whole. *Bottom Line Enterprises*, 302 NLRB 373 (1991). In *Bottom Line*, the Board recognized only two limited exceptions to that general rule: when a union engages in bargaining delay tactics and "when economic exigencies compel prompt action." Id. at 374.
>
> In *RBE Electronics of S.D.*, 320 NLRB 80 (1995), the Board noted that the Board in the past has limited the definition of such economic considerations to "extraordinary events which are 'an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action." *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995), quoting *Angelica Healthcare Services*, 284 NLRB 844, 852–853 (1987). However, in RBE, the Board found that there may also be other economic exigencies, although not sufficiently compelling to excuse bargaining altogether, that should be encompassed within the *Bottom Line* exigency exception. The Board stated (320 NLRB at 82):
>
> > [W]here we find that an employer is confronted with an economic exigency compelling prompt action short of the type relieving the employer of its obligation to bargain entirely, we will hold under the *Bottom Line* exigency exception . . . that the employer will satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain.
>
> The Board then went on to state that (id.):
>
> > In defining the type of economic exigency susceptible to bargaining, however, we start from the premise . . . that not every change proposed for business reasons would meet our *Bottom Line* limited exception. Thus, because the exception is limited only to those exigencies in which time is of the essence and which demand prompt action, we will require an employer to show a need that the particular action proposed be implemented promptly. Consistent with the requirement that an employer prove that its proposed changes were "compelled," the employer must additionally demonstrate that the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable. [Footnotes omitted.]

I do not find that the Respondent has met its burden here to allow it to engage in the unilateral conduct alleged unlawful in the complaint. The end of the R&H contract to supply labor to the Respondent was not an unforeseen event. The contract with R&H was negotiated by the Respondent and it included a termination date. While the termination had been extended in the past, it was not unforeseen by the Respondent that at some point R&H would not agree to renew the agreement. Thus, the Respondent has not established that there was an "extraordinary event" that would extinguish its bargaining obligation. Moreover, the Board has held that events such as loss of significant accounts, or supply shortages do not justify unilateral action. See *RBE Electronics of S.D.*, supra at 81. Here the Respondent was concerned about a potential labor shortage which is akin to a supply shortage.

I also find that the Respondent has failed to establish that its unilateral action in setting employees' terms of employment at variance from those in the R&H agreement had to be done promptly in order to ensure that it had a workforce to continue the plant's operation. While R&H had informed the Respondent that its effects agreement with the Union was contingent on the Respondent and the Union reaching a collective-bargaining agreement and that it intended to remove its employees from the site effective November 1, this did not prevent the Respondent from independently offering the employees jobs at the plant which in fact it did do. There was also nothing to prevent the Respondent from offering those jobs, as it had promised the Union, under the terms of the predecessor's contract until the parties reached acceptable terms of a replacement contract. In fact, the circumstances here were not as dire as the Respondent seeks to portray them, because on October 14, the day after the Respondent's offer of employment to the unit employees, they were informed by R&H Site Manager Hoyt that their failure to accept the Respondent's offer would result in substantial layoffs. Accordingly, I reject the Respondent's contention that there was an "economic exigency" here sufficient to excuse its bargaining obligation.

In sum, I find that the Respondent's purchase of R&H's shares in AtoHaas was a stock transfer, or in the alternative the Respondent was a "perfectly clear" successor as to the R&H unit employees. Under either rationale, the Respondent was not privileged to make the unilateral changes that it made and that have been alleged as unlawful in the consolidated complaint.

E. The Alleged Unilateral Changes

The parties stipulated at the outset of the hearing, based on a stipulation offered by counsel for the Respondent, that complaint allegations 6(a)(i), (ii), (iii), (iv), (v), (vi), and (ix) were "practices or provisions under the Rohm and Haas (collective-bargaining) agreement and that all of those were practices that were not in effect on November 2," when the Respondent employed the employees for the first time. Similarly, Griffith, the Respondent's manager of human resources, testified that all the terms and conditions listed in consolidated complaint paragraphs 6(a) and (b), excluding subparagraphs 6(a)(vii) and (viii), were in effect at the AtoHaas area of the Bristol plant prior to November 2, but were not in effect on that date and thereafter.

On October 27, Griffith, at her request, met with Local 88 representatives Markert and Pofliet to review certain terms of employment that the Respondent intended to implement effective November 2. Markert and Polfleit credibly testified that they were told that there would be no grievance procedure. Rather, Griffith outlined a process where an employee could take a complaint through different levels of management without the Union's participation. Prior to November 2, the Union processed grievances for the bargaining unit employees pursuant to the terms of the R&H collective-bargaining agreements containing a multistep grievance procedure, which called for the Union's participation at most steps. The Respondent's October 10 written offer contained modifications to the R&H grievance procedure, but did not suggest the elimination of the Union's participation in the processing of grievances.

On October 27, Griffith informed the union officials that meal passes would be discontinued as of November 2. Under the Union's contracts with R&H, employees who worked more than 2 hours past the end of their shifts received an additional $7 in compensation referred to as meal pass. The employees were entitled to additional $7 meal passes for every 4 hours worked after the first 2 hours. The Respondent's October 10 proposal provided in paragraph 48 that employees would receive a paid lunch when working 4 hours into their next shift, and paid lunches for the completion of each additional 4 hours of work. The Respondent's October 10 proposal did not provide for the elimination of meal passes. Griffith also announced during the meeting that the Respondent was instituting a 7:30 a.m. starting time for mechanical employees, changing it from 7 a.m. This change had been proposed by the Respondent in its October 10 proposal.

Under the Union's contracts and past practices with R&H, employees were paid double time for hours worked over 12 hours in a workday. They received double time and one-half for hours worked over 8 on a holiday. Employees were paid at time and one-half their normal rate for hours worked on the 6th day in a week or for working on the employee's scheduled day off. Employees were paid a specified shift differential if they worked over 4 hours into another shift. Employees called in to work outside regularly scheduled hours received at least 6 hours pay. Overtime hours were counted in determining eligibility for premium pay and employees were permitted to take less than 8 hours off without giving 24 hours notice provided they obtained supervisory approval. Markert testified that the Respondent had proposed altering premium pay practices during negotiations preceding October 10, but the Union had objected. Markert testified that, during the October 27 meeting with Griffith, the Union was told that the Respondent was going to go by the overtime provisions specified in Sharp's October 13 offer of employment. However, the Union was not specifically told that the Respondent was going to eliminate practices set forth above. As set forth above, Griffith testified that each of the aforementioned practices were eliminated as of November 2.

On November 3, Griffith sent Markert an electronic mail message. Attached was a description of overtime and pay practices which Griffith stated that the Respondent intended to post and was actually posted on November 5. The posting revealed that call-in pay was being reduced from 6 to 4 hours, that hours compensated at overtime rates would not be counted in determining the right to premium pay under other provisions, and that shift differentials would be paid only to employees scheduled to work a shift. The first two changes had been included in the Respondent's October 10 offer, the change relating to shift differentials was not reflected in the October 10 offer.

It was stipulated that R&H unit employees were eligible under specified circumstances for sick and accident benefits paid at 75 percent of an employee's base rate for up to 52 weeks. During bargaining prior to October 10, the Respondent proposed reducing this benefit to 60 percent of base pay for up to 26 weeks. The Union disagreed. On November 3, Griffith sent an electronic mail message to Markert announcing that the Respondent's employees already out on disability would receive sick and accident benefits at 75 percent of base pay for up to 6 months from their initial date of disability, but that any employee absent due to disability beginning after November 2 would be paid only 60 percent of base pay. While the Respondent had argued for a reduction in sick leave benefits during bargaining, sick leave benefits were not mentioned in the Respondent's October 10 final offer. On November 6, Markert sent Griffith a letter protesting the changes including those in accident and sickness benefits and pay and overtime practices stating that these were matters for negotiations and that bargaining was not at impasse.

The R&H contract for production employees provided that employees promoted to a higher paying job received a training rate equivalent to half the difference between their old and new rates during the period before they qualified for the new position. The Respondent proposed to eliminate this practice in pre-October 10 bargaining. The Union objected but the practice was eliminated after November 2. The Union discovered the change when Horton failed to receive a training rate after being promoted in November 1998.

The R&H contracts article XIII wages, section 2 provided for rate protection of up to 2 years when the company established a new job classification or made a bona fide change in an old job classification. The Respondent proposed reducing the period to 1 year and the Union had not agreed as of October 10. After November 2, the period of rate protection was reduced and the Union discovered the change later that month when employees whose jobs were impacted received letters stating that their pay rates would be protected for just 1 year.

The R&H contract for production employees, article VII, section 3, allowed employees who switched jobs 5 days to reverse their decisions. During negotiations, the Respondent wanted to reduce this period to 1 day. The Union objected, but the Respondent put the change into effect on November 2. The Union discovered the change when a unit employee was denied an opportunity to return to his former job in November.

Markert's credited testimony and a side letter to the R&H agreements revealed that R&H paid union representatives for time spent in contract negotiations up to a maximum of 40 hours. The parties disputed the continuation of the practice during contract negotiations, but the Union had not agreed to eliminate it when negotiations ended on October 10. However, the Respondent eliminated the practice after November 2, and

the Union learned of its elimination, when its negotiators who were employed by the Respondent were not compensated for their time.

Markert credibly testified that there was a practice at R&H to hold disciplinary hearings attended by Local 88's president, vice presidents for both mechanical and production employees, wage committee members from where the employee worked, and the employee. The Union would attempt to defend the employee at the meeting. In May 1999, Griffith informed Local 88 Vice President Pofliet, who was also the Respondent's employee, that a hearing was to be held to determine whether another named employee should be disciplined. Polfleit asked if Markert had been informed of the hearing. Griffith responded that Markert would not be permitted to attend since he did not work for the Respondent. Pofliet informed Markert of the disciplinary hearing. Markert called Griffith and was also told that he could not attend. A hearing was convened in Markert's absence with Pofliet and Union Representative Horton in attendance. Shortly after the hearing began, the Respondent representatives announced that they had insufficient evidence against the employee and terminated the hearing. Around a month later, the hearing was reconvened without Markert and the employee received a 3-day suspension.[20]

While working for R&H, unit employees received supplemental benefits while on workers compensation allowing them to receive 90 percent of base pay for up to 52 weeks. In pre-October 10 bargaining, the Respondent proposed a reduction of the supplement to allow for 70 percent of base pay for up to 26 weeks and the Union objected. This proposal was not included in the Respondent's written offer of October 10. However, the Union learned that the benefits were reduced in early 1999 when it obtained payroll records for one of its members.

The R&H contracts provided in pertinent part relating to subcontracting that:

> 1. The Company shall have the right to hire outside contractors. However, the Company shall not have outside contractors to perform Plant work that has customarily been performed by its workforce except to the extent that such work cannot be performed by the Company's own force available at the time the work is to be done.
>
> 2. The Company agrees to keep the Union informed by prior notification when outside contractors are to be brought in the Plant and to the best of its ability will define the scope of the project under contract. The Company will endeavor not to assign Plant employees to work which is in conflict with that of the contractor's employees.
>
> 3. When exercising its right to hire outside contractors, as in Section 1 above, the Company will consider the economic advantage of utilizing its own employees when making its decision to contract out such work.

The collective-bargaining agreements contained a side letter entitled "AOC Process," standing for award of contract process which applied to work pertaining to mechanical employees. Markert's credited testimony revealed that: under the R&H contract's contracting out procedure a work order was created categorizing the potential work to be subcontracted. For work that came within the "AOC Process," the work order would go to the area shop where it would be reviewed by the shop foreman and shop steward. Those two individuals would look at the manpower, the backlog and schedule to determine whether the area shop could perform the work. If they disagreed about whether the work could be performed in-house, the work order would go back to the central shop, where another review would occur by Local 88's mechanical wage committee and the planning and scheduling personnel in that shop. If no agreement was reached there, then the issue would go to the site manager and Local 88's president to attempt to resolve the disposition of the work. Markert testified that if they could not agree, the dispute would be referred to the contractual grievance procedure which culminated in arbitration. Markert testified that the Union had taken contracting out disputes to arbitration against R&H and had been successful in the majority of the decisions.

Markert credibly testified that the Union could not process complaints concerning subcontracting with the Respondent because Griffith had stated, during the October 27 meeting, that the Respondent was not recognizing a grievance procedure with Union participation.[21] Moreover, Horton testified that, towards the end of October or early November, Griffith denied his request to have shop steward elections. Griffith explained to Horton that since there was no contract shop stewards were not recognized by the Respondent.

Horton testified that, after November 2, he observed contractors installing an MCC room at the sites. He testified that the project involved electrical work, concrete work, installing hazardous waste paste, and that this was work that bargaining unit maintenance employees could have performed. Horton testified that after November 2, Respondent officials called him to let him know that contractors were on the site and both he and Pofliet testified that they received electronic mail from Respondent's officials informing them of the subcontracting. Pofliet also testified that he saw contractors performing work between November to August 1999, and that it was work that he thought unit employees could have performed.

Respondent Official Earle manages the production, maintenance, and engineering units for the Respondent. Earle testified that in early November, he gave instructions to his staff to provide at minimum a verbal notification to union officials Polfliet or Horton of subcontracting. However, Earle also testified as follows:

> Q. Are you familiar with the process that was used, and as has been described here today, for notification under the Rohm & Haas contract, are you not?
>
> A. Yes.
>
> Q. After November 2nd, 1998, Elf Atochem did not follow that process, did it?
>
> A. No.

[20] Counsel for the General Counsel stated at the unfair labor practice hearing that the General Counsel is not seeking to have the employee's discipline rescinded as part of the remedy for this complaint allegation.

[21] Pofliet corroborated Markert's testimony that on October 27, Griffith informed them that there was no grievance procedure.

Earle later testified as follows concerning a particular subcontracting incident:

> JUDGE FINE: Did you meet with the union representatives to discuss the pipefitting job, as you would have done under the prior contract?
>
> THE WITNESS: No, we just gave them a notification at this point in time.
>
> JUDGE FINE: So what was the difference between what you were doing then and what you would have—in December to August 15th, 1999—December 1998 to August 15th, 1999, and what you would have done under the prior agreement?
>
> Say, under the prior agreement, you had a project which you felt the employees under that contract couldn't perform although they had the skills. What would you have done?
>
> THE WITNESS: If they did have the skills?
>
> JUDGE FINE: If they had the skills and you—
>
> THE WITNESS: We would go through this process of—as explained in the book, award of contract, the AOC, I believe Don and others alluded to. And we would notify them and usually you just notify them and say, hey, we got this job and it's got to come in—that would just be over the phone, and say, okay, go out with it. Thanks for the notification.
>
> JUDGE FINE: Could the union request a meeting under the contract?
>
> THE WITNESS: Yes, they could request—say, hey, let's talk about it or they might want to talk to the foreman to understand, you know, the needs of the particular job at hand and what other work was going on in the shop and why they couldn't do it.
>
> JUDGE FINE: Well, during the period of December of '98 to August 15th, 1999, was that process available to the union representatives?
>
> THE WITNESS: December—No.
>
> JUDGE FINE: It was not?
>
> THE WITNESS: No. We were working under what was bargained to when the people became our employees.
>
> JUDGE FINE: So the procedure changed, is that correct, during that period of time?
>
> THE WITNESS: Yes.

The Respondent argues in its posthearing brief at page 22 that:

> All the changes alleged by the General Counsel, however, were among the initial terms and conditions of employment with Elf Atochem. . . . The record evidence, however, establishes that the initial terms of employment with Elf Atochem were those in Elf Atochem's contract proposal on October 10, 1998.

The Respondent thereafter contends that it did not change the terms and conditions of the unit employees after they were hired. As set forth above, many of the changes the Respondent instituted for the R&H employees on or after November 2 were not included in the Respondent's October 10 offer, although some of these proposals had been presented to the Union in negotiations leading up to the Respondent's offer. For example, items that the Respondent changed that were not set forth in its October 10 offer included: the elimination of the Union's participation in the grievance procedure, the complete discontinuance of meal passes, the limitation of paying shift differential pay only to employees scheduled to work a shift, the reduction of supplemental workers compensation benefits, and the reduction in sick and accident benefits pay. I have also not credited Sharp's testimony that he informed a substantial number of employees between October 10 and 20 that the Respondent was offering them employment based on its October 10 offer to the Union.

The General Counsel contends, and I agree that changes alleged as unlawful in the complaint were not announced to employees or the Union before the employees accepted the Respondent's offer of employment on October 20, and thereafter recognized the Union on October 21. While the Respondent contends that its October 13 offer of employment informed employees that "Most" of the overtime provisions would remain in effect and thereafter listed which provisions it intended to maintain, I find that the letter was ambiguous. For the letter did not specifically state that the items mentioned in the letter would be the only overtime provisions to be maintained. I would also note that article XIV of the R&H contract is entitled, "Hours, Overtime, and Premium Pay," further adding to the ambiguity of a letter that related solely to overtime when the Respondent made changes after the fact in other areas relating to pay. Even in circumstances, not present here, where a successor employer may announce certain changes in employment prior to a bargaining obligation attaching, it is precluded from making other unilateral changes after that obligation attaches. See *Banknote Corp. of America*, 315 NLRB 1041 (1994), enfd. 84 F.3d 637 (2d Cir. 1996), cert. denied 519 U.S. 1109 (1997); *Ranch-Way, Inc.*, 203 NLRB 911, 913 (1973); and *Quality Food Management*, 327 NLRB 885, 888–889 (1999). I conclude that the Respondent failed to notify the Union or the unit employees of the changes alleged as unlawful here before October 21, the date it concedes that its bargaining obligation attached.

The Respondent asserts at page 22, footnote 7 of its posthearing brief that the Union was notified of each instance of subcontracting, "albeit in a somewhat different form than called for under the Rohm and Haas" agreement. However, Markert testified that the Respondent had in effect eliminated the subcontracting notification and dispute resolution process as required under the R&H agreements because the Respondent had foreclosed the Union from participating in the contractual grievance procedure. The credited testimony also reveals that the Respondent was refusing to recognize union stewards, a position that had played a critical role in the subcontracting process. Markert testified to a fairly elaborate process culminating in arbitration where the Union had several opportunities to challenge subcontracting decisions. Respondent official Earle acknowledged that this procedure was not being applied after November 2. Accordingly, I have concluded that while the Respondent did notify the Union about subcontracting projects, this was not the type of notification that was required

under the R&H contracts, and the Respondent unilaterally eliminated the prior subcontracting procedure.

Respondent Officials Earle and Ramo Kline, a reliability superintendent, testified that the bargaining unit did not have the skill to perform certain projects that were contracted out between November 2 and August 16, 1999, or, if they had the skill, they did not have available time to perform the work. The Respondent argues in its brief that therefore despite any changes in the subcontracting procedures there was no violation of the agreement. I disagree. The Respondent's witnesses testified from memory in April 2000 about a number of subcontracting projects that had been performed between November 1998 and August 1999. Markert disagreed in his testimony from that of the Respondent's witnesses as to the ability of the bargaining unit employees to perform certain work. Moreover, no work schedules were produced here to verify the testimony of the Respondent's witnesses, nor were records produced to verify their testimony as to the timing, nature, or specifics of the subcontracting, some of which involved large projects. The record shows that the Respondent failed to follow the contractual subcontracting procedures and the General Counsel asserts that whether this failure resulted in any improper subcontracting of unit work under the R&H agreements is a matter that should be left to compliance. I agree with the General Counsel based on the state of the record here and recommend to the Board that whether specific work was contracted out in violation of the R&H agreement should be left to the compliance stage of this proceeding. See *Overnight Transportation Co.*, 330 NLRB 1275, 1276 (2000); *Yerger Trucking*, 307 NLRB 567, 576 (1992); and *American Art Clay Co.*, 148 NLRB 1209, 1228 (1964).

In sum, I have concluded, as set forth above, that the Respondent's purchase of R&H's share of AtoHaas and its hiring of the R&H unit employees was part of a stock transfer agreement and as such the Respondent was bound to the predecessor's contract, or at a minimum the Respondent was a "perfectly clear" successor and therefore it was not privileged to make unilateral changes without bargaining to impasse with the Union. I have concluded that the Respondent did not bargain to impasse and that it did not have any other defense justifying the unilateral changes that I have found that it made here. Moreover, I have concluded that the Respondent did not notify the Union or the employees of the changes alleged here to be unlawful until after October 21, 1998, when the Respondent admits that it had a bargaining obligation and therefore regardless of its status prior to that time, the Respondent had an obligation to bargain over the changes. Accordingly, I have concluded that the Respondent violated Section 8(a)(1) and (5) of the Act by making the unilateral changes alleged as unlawful in the consolidated complaint.[22]

[22] The Respondent's exclusion of Markert from the parties' disciplinary hearing constituted a unilateral change as the testimony established that the local union president had theretofore been a participant in those meetings. It also constituted an improper interference with the Union's selection of its grievance representatives and was violative of Sec. 8(a)(1) and (5) of the Act. See *Columbia Portland Cement Co.*, 294 NLRB 410 fn. 2 (1989), enfd. in pertinent part 915 F. 2d 253 (6th Cir. 1990).

CONCLUSIONS OF LAW

1. Respondent, Elf Atochem North America, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steelworkers of America, AFL–CIO–CLC and United Steelworkers of America, Local 88, jointly referred to as the Union, are labor organizations within the meaning of Section 2(5) of the Act.

3. At all times material, the following described unit has been an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees employed by the Respondent at its Bristol, Pennsylvania facility engaged in general and departmental maintenance and certain installation work and all hourly paid production employees including production department quality control laboratory employees, common laborers, receiving and shipping employees; and excluding office clerical employees, salaried employees, all other laboratory employees, safety and plant protection department employees and all supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

4. At all times material the Union has been, and is now the exclusive representative for the employees in the bargaining unit described above in paragraph 3 (the unit employees) for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. The Respondent, a successor employer by way of a stock transfer, violated Section 8(a)(1) and (5) of the Act by failing to follow the terms and conditions of employment and related past practices set forth in the collective-bargaining agreements between the Rohm and Haas Company and the Union for the unit employees, during the period of November 2, 1998, through August 15, 1999, by unilaterally changing terms and conditions of employment by: (a) eliminating the payment of meal passes; (b) changing the starting times of mechanical department employees; (c) eliminating the payment of a training rate to employees who moved to a higher job classification for the period prior to the employees being considered qualified for the new classification; (d) reducing the period during which involuntarily demoted employees would be paid at their existing rates; (e) reducing the workers compensation supplement paid to employees; (f) eliminating the grievance procedure contained in the contracts between the Unions and Rohm and Haas Company; (g) refusing to pay union representatives for time spent in negotiations up to a maximum of 1 week; (h) refusing to follow the procedure regarding subcontracting contained in the Unions' contracts with Rohm and Haas Company; (i) eliminating the practice of permitting employees to return to their former positions within 5 days after assuming new positions; (j) eliminating payment at two times an employee's hourly rate for hours worked over 12 per day; (k) eliminating payment at 2-1/2 times an employee's hourly rate for certain hours worked on holidays; (l) reducing call-in pay from 6 hours to 4 hours; (m) eliminating payment at 1-1/2 times an employee's hourly rate for hours worked on the employee's day off or on the 6th day in a week; (n) eliminating the practice of counting overtime hours

in determining eligibility for premium pay; (o) eliminating the payment of shift differentials when an employee was not scheduled to work the shift to which the differential applied; (p) eliminating the practice of permitting employees to take less than 8 hours off with less than 24 hours notice when they obtain approval of a supervisor; (q) reducing sick and accident benefits paid to employees, and by (r) refusing to permit Local 88 President Donald Markert attend a disciplinary hearing because Markert was not employed by the Respondent.

6. The above unfair labor practices described above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in conduct in violation of Section 8(a)(1) and (5) of the Act, it is ordered to cease and desist therefrom, and to take the following affirmative action deemed necessary to effectuate the policies of the Act.

Respondent is ordered to recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of its employees in the unit found here to be appropriate. The General Counsel has asserted in his brief that since the parties have reached a new collective-bargaining agreement effective August 16, 1999, there is no need to reverse the unilateral changes found here. However, the General Counsel does request that the affected employees be made whole by the Respondent for losses incurred during the period of November 2, 1998, to August 15, 1999, as a result of those changes and I concur and find that the Respondent should be ordered to make the unit employees whole for such losses with interest computed in the manner set forth in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). Included in the recommended remedy is the requirement that, on the request of the Union on behalf of a particular employee, employees be allowed to return to their former positions who were denied that right during the period of November 2, 1998, to August 15, 1999, as a result of the Respondent's elimination of the practice of permitting employees to return to their former positions within 5 days after assuming a new position. While I have found that the Respondent unlawfully failed to abide by contractual subcontracting procedures, the record is unclear at this stage as to whether any unit employees incurred losses as a result of this particular conduct. I have reserved this determination for the compliance stage of the proceeding, and if losses to employees are found at the compliance stage they should be made whole in the same manner set forth above.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, Elf Atochem North America, Inc., Bristol, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with United Steelworkers of America AFL–CIO–CLC and United Steelworkers of America Local 88 concerning the rates of pay, wages, hours and working conditions of employees in the following appropriate unit:

> All employees employed by Elf Atochem North America, Inc. at its Bristol, Pennsylvania facility engaged in general and departmental maintenance and certain installation work and all hourly paid production employees including production department quality control laboratory employees, common laborers, receiving and shipping employees; and excluding office clerical employees, salaried employees, all other laboratory employees, safety and plant protection department employees and all supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

(b) Unilaterally changing terms and conditions of employment established by the collective-bargaining agreements and practices related thereto in effect during the period of November 2, 1998, to August 16, 1999.

(c) Refusing to permit Donald Markert or other nonemployee union representatives to participate in disciplinary hearings.

(d) In any like or related matter interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively and in good faith concerning wages, hours, and other terms and conditions of employment with the Union as the exclusive representative of employees in the above-described unit.

(b) Recognize and bargain with Donald Markert and other nonemployees as representatives of the Union in disciplinary hearings.

(c) On the request of the Union on behalf of a particular employee, allow employees to return to their former positions who were denied that right during the period of November 2, 1998, to August 15, 1999, as a result of the Respondent's elimination of the practice of permitting employees to return to their former positions within 5 days after assuming a new position.

(d) Make employees, in the above-described unit, whole for any losses they may have suffered as a result of the unilateral changes in their terms and conditions of employment during the period from November 2, 1998, through and including August 15, 1999, in the manner set forth in the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, subcontracting records, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Bristol, Pennsylvania, copies of the attached notice

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 2, 1998.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply herewith.

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."